

Following is the text of a sidebar to an article in the April, 1995, issue of *Soldier of Fortune* magazine, page 48, entitled "...necessary to the security of a free State...", by Mike Williams. The sidebar, by Wayne Anthony Ross, appears on page 52. There are numerous defects in this sidebar, and some defects in the main article. I provide a critique of the sidebar first, then of the article, following the text of the sidebar. Readers are invited to offer further criticism and to convey them to Robert K. Brown of *Soldier of Fortune*, 5735 Arapahoe Ave, Boulder, CO 80303-1340, 303/449- 3750.

The sidebar is here recomposed for fax transmission, and because the author had an advance copy of it a month prior to publication, choosing not to react to it until after it was published in its final form, in case some of the defects might have been removed in editing. They weren't.

Join A Militia -- Break The Law?

Legal research on the subject of militias raises the question of their authority to organize. Article 1, Section 8 of the Constitution of the United States provides that: "The Congress shall have the power ... To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions ... To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of officers, and the authority of training the militia according to the discipline prescribed by Congress."

The Second Amendment reads: "A well regulated militia being necessary [for] a free State, the right of the people to keep and bear arms shall not be infringed."

The Constitution, therefore, demonstrates that militias are a creature of the state, subject to being called forth by the U.S. government "to execute the laws of the Union..." This is bolstered by the wording of the Second Amendment which holds, "A well regulated militia being necessary [for] a Free State..." and by Article 1, Section 8, Subsection (16), which reserves to the states "the appointment of officers and the authority of training the militia..."

Title 10, U.S. Code, Section 311 further stipulates that the militia consists of *all* able-bodied males aged 17 to 45, both citizens and those who have declared their intent to become citizens, and of female citizens who are officers of the National Guard. It also specifies that the militia consists of two classes: the organized militia and the unorganized or reserve militia. Many states have similar statutes. Those citizens who apply, or are called up for service and are accepted by a state militia, are part of an organized militia. All others eligible under the law are members of the unorganized militia, and are subject to call up by the state.

Thus, while most citizens are members of the militia, and therefore have the right to keep and bear arms to respond to a call to assemble by lawful authority, the appointment of officers, and the training of militia members are the responsibility of the state. These militias that purport to support the Constitution, yet have appointed their own officers and conduct their own training without authority from the state, are therefore in apparent violation of Article 1, Section 8, Subsection 16 of the U.S. Constitution.

The Michigan Constitution provides in Article III, Section 4, that "The militia shall be organized, equipped and disciplined as provided by law." This "rump" organization has not been "organized, equipped and disciplined as provided by law." Instead private citizens, well-meaning though they may be, have organized, equipped and presumably disciplined themselves without any legal authority whatsoever.

Interesting enough, the state of Michigan, and a number of other states, already have organized militias other than the National Guard. In Michigan, this militia is known as the Michigan Emergency Volunteers. Other states call their organizations State Guards, State Military Reserves, State Militias or State Defense Forces. One wonders why this Michigan group doesn't simply join the authorized and organized Militia of Michigan.

Further evidence that states retain the power to govern and regulate militias can be found in *American Jurisprudence*: "...the state governments have the power to regulate or prohibit associations and meetings of the people .. and they also have the power to control and regulate the organization, drilling, and parading of military bodies and associations, except when such bodies or associations are authorized by the militia laws of the United States. The exercise of this power by the states is necessary to the public peace, safety, and good order. To deny the power would be to deny the right of the state to disperse assemblages organized for sedition and treason, and, the right to suppress armed mobs bent on riot and looting.

"Prohibiting any body of men, other than the regular organized militia and the regular troops of the United States, to associate themselves together as a military company or organization, or to drill or parade with arms without a proper license, is not violative of the federal Constitution."

In light of this guidance, states have enacted legislation regarding militia-type training. The California Penal Code Section 11460 states:

"(a) Any two or more persons who assemble as a paramilitary organization for the purpose of practicing with weapons shall be punished by imprisonment in the county jail for not more than one year or by a fine of not more than one thousand dollars (\$1,000), or by both.

"As used in this subdivision, 'paramilitary organization' means an organization which is not an agency of the United States government or of the State of California, or which is not a private school meeting the requirements met forth in Section 12154 of the Education Code...

"(b)(I) Any person who teaches or demonstrates to any other person the use, application, or making of any firearms, explosive, or destructive device ... or any person who assembles with one or more persons. for the purpose of training with ... the use of any firearm ... with the intent to cause or further a civil disorder shall be punished..."

The Second Amendment should not be confused with the legality of citizens militias. The NRA, while supporting and defending the amendment, does not believe that the right to keep and bear arms is dependent upon membership in a militia, and has drafted this response:

"It is the NRA's view, based on law (Article 1, Section 8 of the U.S. Constitution; Title 10, U.S. Code, Section 311(a)), court precedents, and legal historical interpretation, that all able-bodied persons, explicitly those between the ages of 17 and 45, are members of the federal unorganized militia, except members of the organized state guards ... the National Guards of the various states (which also serve as a part of the National Guard of the United States, a military reserve subject to nationalization by the President of the United States), and certain government officials. An "organized citizen militia" must be created under the Constitution itself and/or the laws of a state.

"Title 10, U.S.C., clearly affirms the existence of the citizen militia; it is little changed since the original Militia Act of 1792 (except for the addition in this century of recognition of the third type of militia, the federally supported National Guard, in addition to the enrolled and unenrolled militia).

"Further, the individual right to own firearms is guaranteed by the Constitution, but the right to own firearms is not at all dependent upon the militia clause. The militia clause of the Second Amendment merely adds to the reason for the right, which is a common law right rooted in the right of protection of self, family, and community.

"The Second Amendment guarantees an individual's right to arms; participation in a citizen militia organization does not make that right more valid nor any stronger."

-- *Wayne Anthony Ross*

Critique of "Join a Militia -- Break the Law?"

By Jon Roland

It is unclear from the way the sidebar is presented whether the editors intended it to represent an opposing view to that of the main article. If so, then this intent should have been shown by some label such as "an opposing view". However, since it mainly discusses points of law, it is not opposed to the main article, which discusses events and personalities. Balance would require a discussion of opposing legal arguments. Since these are missing from this issue of the magazine, and since the legal points made in the sidebar are painfully unsound, I will herein present a legal brief on the subject which corrects some of the deficiencies of the sidebar.

One of the things missing from the magazine is information about the author, Wayne Anthony Ross, and his credentials to write such a legal analysis. My source states that he is a colonel in the Alaska State Defense Force, which is a select militia of the State of Alaska. I do not know if he has had any legal training, but his article indicates that if he has, he didn't master his lessons. Taken as a position statement, his sidebar seems to represent the legal doctrine on the subject that the Ruling Elite would like to establish. It is not clear that he has any authority to speak for the NRA, but if he has accurately stated their position, then that position is in error and needs to be changed.

First, Ross misquotes the Second Amendment. He substitutes the word "for" for the phrase "to the security of". This is indicated in the sidebar by surrounding the word "for" in brackets, but the editors should have made the correction. They got it right in the main article by Mike Williams. That Ross cannot quote the Constitution correctly, and the editors of the magazine can't catch it, is indicative of the quality of the reasoning elsewhere in the sidebar.

Second, Ross commits the *non sequitur* that reserving the training of militias and the training of their officers to the states, as provided in Article 1, Section 8, Para. 16, means delegating an exclusive power to the state *governments*. It is clear from the language and from historical analysis of the development of the Constitution that "reserving to the states" only meant the power was denied to the national government. For the Framers, the State was the "people of the state", not the "government of the state". When they wanted to indicate the government of a state, they used the language "Legislature of the State", as they do in Article 1, Section 8, Para. 17. It was left to the people of each state to decide what powers, if any, to delegate to their state governments for organizing and training militias and for the appointment of their officers. In the absence of such delegation of authority, the authority defaults to local communities under common law and established practice during the period in which the Constitution was adopted. That practice was for militias to be organized by county or township, usually under the authority of the highest elected law enforcement official, such as the sheriff or constable. However, any credible person could call up the militia, as Paul Revere did during his famous midnight ride.

Third, Ross makes the hidden and false assumption that a militia must be some large assembly of persons. Under the republican theory of government on which this nation was founded, the right of self-defense which we have in the state of nature, becomes transformed, when we enter into the Social Contract, into a *duty to defend the community*. When a solitary person defends himself against criminal attack, he is not, strictly speaking, defending himself. He is defending the community. It just happens that the member of the community he is defending is himself. When he does so, he is calling up the militia, even though the only militiaman he calls up is himself. If he asks any other person for aid in doing so, he is calling up the militia consisting of the two of them. And so forth for larger numbers of persons. There is no minimum size to the militia.

Fourth, Ross falsely claims that the 1903 Dick Act, which is encoded in 10 USC 311, did not substantially change the Militia Act of 1792, and that it is constitutionally valid in the definitions it advances. In fact, it repealed the Militia Act of 1792, which required all free white able-bodied males age 18 to 45 to keep a weapon then considered suitable for militia duty, and which was amended in 1862 to include all males regardless of race. The Dick Act introduced a subtle change in word usage. That part of the total militia which were required to keep a weapon began to be treated as though it were the entire militia, although its language did suggest that they were the militia which was required to respond to a call up. The Dick Act also introduced the term "unorganized" for that portion of the militia not included in various select militias such as the National Guard, with the evident intention that they *remain* unorganized, which is clearly contrary to the intentions of the Framers. In 1933, the National Guard Act amended the Dick Act to establish the authority for raising the National Guard not on the "militia clause" but on the "army clause", thus making it a part of the regular armed forces, subject to being sent abroad, as the constitutional militia is not. What 10 USC 311 defines as the "unorganized" militia might more properly be called the *obligatory* militia, those who may be *required* to respond to a call up. That is clearly a subset of the entire militia, which includes all citizens and persons intending to become citizens, male or female, of whatever age, able-bodied or not.

A militiaman is simply any citizen in his capacity as a defender of the community, who is obliged to do so within his or her ability. Militiahood is a role which citizens may play as the situation requires it. It is not a permanent condition. But just as each citizen has a duty to defend the community, he also has the duty to prepare himself to play that role effectively, and to join with others in his community to train and to function as organized forces, and the elected officials of his community have the duty to facilitate that organization and training. If those officials fail in their duty, he must carry on without their participation.

Even though the Militia Act of 1792 has been repealed, by the logic of the Constitution, that part of the militia which is the obligatory militia still has the duty, and not just the right, to keep and bear arms suitable for militia duty. For all others, it is just a right and not a duty.

Ross asks why the persons who have become active in the Michigan Militia did not just join the Michigan Emergency Volunteers, the State Guard. The answer to that goes to the heart of the concept of the militia. State Guards are *select* militias, not *true* militias. To be a true militia, it must be open to all of the citizens in a community, normally the result of a general call up to an entire area, representative of the community as a whole, and not just a few persons chosen for compliance with some purpose of the authorities and subservient to their commands.

One of the main purposes for the militia is to serve as a counter to the government and any standing army it might maintain. The Framers intended that the militia should always be able to prevail over that combination, and over any select militias that might arise, if there were a confrontation between them. The role of the militia is to enforce the laws, beginning with the Constitution, especially in those situations where the lawbreakers are public officials themselves and the regular processes of law enforcement have failed to control official misconduct. That is precisely the situation in which we find ourselves today.

The quote from *American Jurisprudence* is another example of Establishment Doctrine that is ignorant or defiant of constitutional principles. People have the natural right, recognized in the First Amendment, to peaceably assemble, subject only to the property rights of the owner of the property on which the assembly takes place. Since they also have the right to keep and bear arms, and since any rights which may be exercised separately may be exercised in combination, then they have the natural right to assemble as a militia, bearing arms, and to organize and train, provided that they do not otherwise commit any offenses against innocent persons. States may have some authority to regulate the operations of *select* militias, but not to prohibit them on the grounds that they might commit some offense against an innocent person. Furthermore, if a militia musters in response to a public notice, it is a *true* militia, and has a special status under common and constitutional law, with the right to ignore private property rights when necessary to conduct military operations. Such a true militia takes on the character of a *convention of the whole* of the community, and as such is superior to all governmental authorities of that jurisdiction, with the power to replace officials and re-organize governmental institutions, subject to ratification by a general vote. In a republican form of government, direct democracy is not the norm, but the people may have to resort to it temporarily if republican institutions fail to serve them.

Citing California Penal Code Section 11460 is instructive. It is clearly unconstitutional, even under the California Constitution. The rights to assemble and to bear arms are unalienable natural rights, the infringement of which are prohibited by the First and Second Amendments to the U.S. Constitution, extended to the states by the Fourteenth Amendment. As written, it would seem to prohibit every kind of shooting club, range, or hunting club. In fact, it is one of those statutes never intended to be applied strictly, but at the discretion of law enforcement officials, against people they don't like. Such intentional selective enforcement itself makes the statute unconstitutional. To be constitutional, a statute must be intended to be uniformly applied, and actually applied uniformly, even if not always thoroughly.

The alleged NRA statement is obviously confused. For example, it states that members of state guards are not part of the federal "unorganized" militia, but under 10 USC 311, members of state guards are not recognized as being outside the "unorganized" militia. State guards are not mentioned in the statute. A state militia is indeed subject to state law and officers appointed by the state government, *if it is called up by the Governor* of the state, and *if that call up is of the entire militia* of an area and not just of a select part of it. Similarly, the militia is subject to local law and local officials if called up by them, provided that the call up is of the entire militia of the locality. That authority extends only to the duration of the emergency for which the call up was issued, and then only if the officials are acting in accordance with constitutional law. If they are violating their oaths of office, the militia has the duty to arrest them and elect new officers to act in their stead until a new election can be held to replace them.

Finally, Ross implicitly assumes throughout his sidebar that the Constitution or common law confers rights, and that people do not have a right unless it is granted them by the Constitution or common law, the doctrine that "everything that is not permitted is forbidden." Under our system of government, the people have all powers of government. They may pool those powers, and limit the zones within which they may freely exercise them, but they give up none of them. Government has only those powers granted to it by the people, which they may reassert whenever they determine that government has abused those powers, especially when that abuse includes the corruption of the courts and of elections, so that normal avenues of recourse are unavailable and a crisis of legitimacy prevails. This is the situation in which we now find ourselves, and it is that situation that drives the militia movement.

Ross does get one thing right. The right to keep and bear arms does not depend on the right to assemble as a militia. It is, however, an inseparable component of it, if the concept of the militia is properly understood, which is apparently not the case for many of the people who should be expected to understand it.

Critique of "... necessary to the security of a free State ..."

By Jon Roland

This article is, on the whole, a good one. There are only a few small matters that deserve comment. First, Williams mentions in the first paragraph that "there are citizens militia groups active in every state except Hawaii and Delaware." He apparently got that from a press release I put out in which I mentioned that I had "received inquiries from every state except Hawaii and Delaware" for information on organizing militias. That is old news. Since then I have found militias in both of those states, but there are still two states in which I have not had a reliable report of a militia being activated: New Jersey and Rhode Island. I would appreciate being put in touch with any militias that have formed or may form in those states, as well as in other states on which I have reports but have not yet established contact.

Actually, there is one single issue that has triggered this nationwide militia movement. It is the increasing violation of the U.S. Constitution and constitutional laws by federal and state officials. Activists may differ in the violations with which they are most concerned, but most of their concerns revolve around violations of some kind.

The sinking feeling that many activists have is not that federal judges are answerable to "no one", but that they are answerable to criminal special interests and corrupt officials, and not to the Constitution or to constitutional laws.

It should always be made clear that statutes, such as those of Oregon, California, and Idaho, are not laws. To be a law, a statute must be constitutional. Those statutes are not constitutional, and are therefore null and void from their inception. Citizens have the right and duty to ignore or resist such statutes, regardless of personal consequences.

Although it is doing some useful work, the United States Field Forces/National Militia is a select militia, a private association, not a true militia. Neither is the Texas Light Infantry, although they play a valuable role in helping to train county militia units in Texas. And the Texas Constitutional Militia, a unit of which I first activated in Bexar County on April 19, 1994, is not comprised of just those persons who are active in it. The term is only properly applied to the entire population of Texas, and only those units which meet in response to public notices can properly be called units of the TCM. Without public notices, those meeting can only properly be called "militia activist groups", perhaps playing an important leadership role, but not themselves the militia for their county or locality.

Finally, although Steve Brown deserves credit for serving as the commander of Unit 1 of the Bexar County Militia (there is at least one other unit), he may not have the resources to answer a flood of inquiries from all over the country about how to activate a local militia. Such inquiries might better be directed to the Texas Militia Correspondence Committee, 6900 San Pedro #147-230, San Antonio, TX 78216, 210/224-2868. We have an 80+ page package of materials which many activists say they have found useful, including some materials customized for each state and county, and we can put persons in touch with any local militia units in their area. We are soliciting additional materials to be included in this package, and welcome contributions which may be useful to organizers.
